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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ARMSTRONG, Defendant and Appellant.	D068264 (Super. Ct. No. SCS258512)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Reversed and remanded with directions.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristen Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

In August 2012, Charles Armstrong pleaded guilty to one felony count of second degree burglary. (Pen. Code,[1] § 459.) The trial court sentenced Armstrong to a two-year prison term.

On November 4, 2014, the California electorate passed Proposition 47. Proposition 47 amended various provisions of the Penal and Health and Safety Codes to reduce certain drug and theft-related offenses to misdemeanors, unless the crime was committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47, or the Safe Neighborhoods and Schools Act, was enacted for the purpose of ensuring "that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

In December 2014, Armstrong unsuccessfully petitioned under section 1170.18 to have his felony burglary conviction converted to a misdemeanor under the newly added section 459.5. Because Armstrong committed the offense by cashing a fraudulent check, the trial court found that Armstrong was not entitled to relief, and that the shoplifting statute (§ 459.5) applies to the shoplifting of store merchandise only.

As we will explain, the trial court's interpretation of section 459.5's "intent to commit larceny" requirement is too restricted. The trial court narrowly interpreted the

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1 All further statutory references are to the Penal Code unless otherwise specified.

shoplifting statute (§ 459.5) to apply only to theft of merchandise, not to theft by false pretenses. The trial court decision did not properly evaluate section 490a and its application to the interpretation of the intent to commit larceny as defined in both the burglary statute (§ 459) and the shoplifting statute (§ 459.5). Because the trial court erred in failing to consider section 490a, we reverse the court's order denying Armstrong's petition and remand with directions to grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are not in dispute. On June 28, 2012, Armstrong entered an Advance Pay Day Plus and cashed a fraudulent check in the amount of $236.51.

Thereafter, on August 1, 2012, Armstrong was charged by felony complaint with burglary (§ 459, count 1) and forgery of checks, money order, traveler's check, etc. (§ 470, subd. (d), count 2). Armstrong waived his right to a jury trial and entered a guilty plea to count 1 (§ 459). Count 2 (§ 470, subd. (d)) was dismissed. The factual basis for the plea indicated that Armstrong "[e]ntered a building with intent to commit theft." The trial court then sentenced Armstrong to a two-year prison term.

In December 2014, Armstrong filed a petition for resentencing pursuant to section 1170.18 to reduce his felony burglary conviction to misdemeanor shoplifting. Armstrong argued he was eligible for resentencing because his offense would have been classified as a misdemeanor under the newly enacted section 459.5. The trial court, however, found that his offense did not fit within the statutory definition of shoplifting in section 459.5 and denied Armstrong's petition. Specifically, the court found that Armstrong's intent to

commit theft by false pretenses did not satisfy the requirement in section 459.5 of "intent to commit larceny."

On appeal Armstrong argues he is eligible for resentencing because the trial court ignored the mandate of section 490a to substitute "theft" in place of "larceny" when reading section 459.5.

DISCUSSION

Armstrong asserts the trial court erred by concluding that section 459.5's reference to "larceny" does not encompass theft by false pretenses. The People contend section 490a is inapplicable, and Armstrong's burglary conviction does not constitute shoplifting under section 459.5. Here, the legal issue presented is whether entering a check cashing store and cashing a fraudulent check with a value less than $950 constitutes shoplifting under section 459.5.

A. Legal Principles

Proposition 47 added section 1170.18, which allows "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47 had it] been in effect at the time of the offense" to "petition for a recall of sentence" and request resentencing. (§ 1170.18, subd. (a).) A person seeking resentencing under section 1170.18 must show he or she fits the criteria in subdivision (a). If the person satisfies the criteria the person shall have his or her sentence recalled and resentenced to a misdemeanor, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of

danger to public safety. (§ 1170.18, subd. (b); *T. W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

Relevant here, Proposition 47 also added a new crime of shoplifting, which is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)

In interpreting section 459.5, Armstrong urges we look to section 490a for guidance. Section 490a provides, "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Specifically, our issue requires us to find the correct interpretation of the term "larceny" as used in section 459.5. " 'In interpreting a voter initiative like [Proposition 47], we apply the same principles that govern statutory construction.' [Citation.] " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " [Citation.] In the case of a provision adopted by the voters, 'their intent governs.' [Citation.] [¶] 'In determining such intent, we begin with the language of the statute itself.' [Citation.] We look first to the words the voters used, giving them their usual and ordinary meaning. " 'If there is no ambiguity in the language of the statute, then . . . the plain meaning of the language governs.' " [Citation.] "But when the statutory language is ambiguous, 'the court may examine the context in which the language appears, adopting the construction that best

harmonizes the statute internally and with related statutes.' " [Citation.] [¶] In construing a statute, we must also consider " 'the object to be achieved and the evil to be prevented by the legislation.' " [Citation.] 'When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears.' " (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099-1100.)

B. Analysis

The People contend Armstrong did not commit shoplifting when he entered an Advance Pay Day Plus with the intent to commit theft by false pretenses because shoplifting requires an intent to commit larceny. Also, the People argue section 490a is inapplicable because it does not redefine larceny as any theft. We are not persuaded by these arguments. Historically, the term "larceny" as used similarly in the burglary statute has been interpreted to include all thefts, including theft by false pretenses. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 30; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 31; *People v. Parson* (2008) 44 Cal.4th 332, 353-354.) In January 2016, Division Eight of the Second District Court of Appeal found that an intent to commit theft by false pretenses satisfies the section 459.5 requirement of "intent to commit larceny" in *People v. Vargas* (2016) 243 Cal.App.4th 1416 (*Vargas*). *Vargas* found that "because voters adopted the phrase 'intent to commit larceny' in section 459.5, which mirrors the intent element in the general burglary statute (§459), and that phrase includes theft by false

pretenses, we believe the voters intended section 459.5 to include theft by false pretenses." (*Vargas, supra,* at p. 12.)

Since the briefing in this case was completed, the Third District Court of Appeal addressed the question of whether shoplifting under section 459.5 could only occur where the defendant entered the commercial establishment with the intent to commit common law larceny. (*People v. Triplett* (2016) 244 Cal.App.4th 924 (*Triplett*).) The court concluded that entry into a commercial establishment, during regular business hours, with the intent to commit "theft" in an amount less than $950 constitutes shoplifting under the new statute. The court in *Triplett* rejected the People's argument that such crime could only be committed with an intent to commit larceny.

This court recently filed its opinion in *People v. Root* (2016) ___ Cal.App.4th ___ (2016 Cal.App. LEXIS 160), in which we agreed with both *Vargas, supra,* 243 Cal.App.4th 1416 and *Triplett, supra,* 244 Cal.App.4th 924. In *Root* we held that shoplifting could be committed by the requisite entry and amount of loss where the entry was with the intent to commit theft. We continue to believe our analysis in *Root* and that of the other courts discussed above are correct and we will follow such analysis here.

In *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*), our high court discussed whether a man who committed theft by false pretenses and subsequently pushed a security guard in an attempt to flee could satisfy the "felonious taking" requirement of robbery. (*Id.* at pp. 779-780.) One element of robbery, which is not present in any other type of theft, is the "felonious taking" requirement. The defendant argued that the "felonious taking" requirement could only be satisfied by the crime of theft by larceny,

and not theft by false pretenses. (*Id*. at p. 781.) The court, after analyzing the common law meanings of the different theft offenses, found that larceny is a necessary element of robbery. (*Id*. at pp. 786-787.) Thus, *Williams* held that theft by false pretenses could not support a robbery conviction, because only theft by larceny could fulfill the "felonious taking" requirement.

The analysis in *Williams, supra*, 57 Cal.4th 776 is distinguishable from our current issue of whether section 459.5 can be satisfied by theft by false pretenses. This is because the term "larceny" is not actually present in the statute defining robbery (§ 211). As such, *Williams* looked at the common law meaning of larceny in order to reach the conclusion that larceny is a necessary element of robbery. Therefore, the court was not analyzing the statutory interpretation of the term "larceny," but was analyzing the common law meanings and relations of the different theft crimes.

Conversely, in *People v. Nguyen, supra*, 40 Cal.App.4th 28, we discussed whether a defendant could be convicted of burglary for entering the premises of another with the intent to commit theft by false pretenses. *Nguyen* held that the term "larceny" as used in the burglary statute included theft by false pretenses. In reaching our conclusion, we noted that section 490a shows "the Legislature has indicated a clear intent that the term 'larceny' as used in the burglary statute should be read to include all thefts, including 'petit' theft by false pretenses." (*Id.* at p. 31.) The *Nguyen* holding is more on point with the issue here, because, unlike *Williams, supra*, 57 Cal.4th 776, we analyzed the interpretation of the term "larceny" as used in a statute.

Additionally, the People argue, in enacting section 459.5, the voters intended to restrict its application to stealing goods or merchandise openly displayed in retail stores. The People assert that "shoplifting" has long and commonly been understood to encompass only the theft of openly displayed merchandise from commercial establishments. As such, the People contend the voters' reasonable belief was that the crime of "shoplifting" referred only to the common understanding of that crime. However, in viewing the plain text of the statute, we find nothing to support that contention. Had the voters intended for "shoplifting" to be confined to that limited meaning, that intention could have easily been expressed in the text of the statute. Instead, the statute was worded substantially similar to the burglary statute (§ 459), which has been judicially interpreted to encompass all thefts. As previously noted, "[w]hen legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears." (*Rivera, supra,* 233 Cal.App.4th at p. 1100.) We find no indication that a distinction was intended to be made between sections 459 and 459.5 in regard to the interpretation of the term "larceny."

Our interpretation is consistent with the voters' overall intent in passing Proposition 47. Proposition 47 was intended to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70.) Petty theft by false

pretenses is precisely the type of nonserious, nonviolent crime Proposition 47 was aimed towards affecting. For example, Proposition 47 also made the crimes of forgery and drafting checks without sufficient funds of less than $950 misdemeanors. (§ 473, subd. (b); § 476a.) Moreover, theft by false pretenses is less likely to involve violence than a situation where a person has the intention to steal openly displayed merchandise from a store. To provide misdemeanors for that type of theft, but not for theft by false pretenses, would contradict the voters' general intent of requiring misdemeanors for nonserious, nonviolent theft crimes.

In considering section 490a, we find that it requires us to have the word "larceny" read as "theft" in section 459.5. As such, the "intention to commit larceny" requirement of section 459.5 can be satisfied by the broader sense of an intent to commit theft. Thus, an intent to commit theft by false pretenses would satisfy that element. Not only is this consistent with prior case law regarding the interpretation of the term "larceny" as used in section 459, but it is also consistent with the voters' intent in passing Proposition 47. Lastly, interpreting the term "larceny" differently in section 459.5 than we would in section 459 would cause the interpretations of the two related statutes to be inconsistent and would ignore the mandate of section 490a.

DISPOSITION

The order denying recall and resentencing under section 1170.18 is reversed and remanded with direction to grant the petition.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.